In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4392

BERNARD WARD and T. FURIHATA,
Plaintiffs-in-Error

vs.

UNITED STATES OF AMERICA,
Defendant-in-Error

Upon Writ of Error to the United States District Court
for the Western District of Washington
Northern Division

Brief of Defendant in Error

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ARGUMENT

Answer to Paragraph I.

The cases cited by counsel for plaintiff-in-error Ward are beside the point in this case. There is no question as to whether or not a sale was con-

summated. It is admitted that the liquor was delivered, and money paid therefor.

The only question involved is whether or not there was sufficient evidence to show that plaintiff-in-error Ward was one of the vendors. There was evidence to show that the whiskey was ordered in the elevator when both defendants Hoffman and Ward were present; that after the government agents got out of the elevator on the second floor, both Hoffman and Ward continued on up in the elevator; that Ward came down in three or four minutes and directed agents into room No. 204, saying that "Hoffman would bring the stuff there" (Tr., p. 16); that Hoffman followed soon after with the two bottles of whiskey and was given Twenty Dollars ($20.00) in marked money.

It is submitted that there was ample evidence here to show that Ward knew what was going on, and sufficient to satisfy the jury that he had an interest in the sale, and the verdict shows that the jury did not believe Ward's explanation of the part played by him in the transaction. There certainly was a meeting of the minds in this transaction.

Answer to Paragraph II.

Counsel contends that there is an inconsistency in the finding of the jury, wherein the jury found Ward not guilty of possession, but guilty of sale. Counsel says: "It is a conceded fact that the liquor charged by the government to have been sold under Count II was a part of the liquor which it was claimed by the Government the parties possessed under Count I."

So far as the Government is concerned it is *not a conceded fact*, that the same liquor is involved in both counts. The Transcript of Record has been searched thoroughlv from cover to cover, and counsel for plaintiff-in-error is challenged to show wherein there is any proof that the same liquor was involved in both counts. On page 7 of the Transcript beginning with line six, we find the following:

"Government exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 are introduced as evidence. Government rests. Motion is made by defendants that Government be required to elect which group of liquor set forth in count I it will select to establish charge of possession. Said motion is granted. J. F. Dore for defendants moves for a directed verdict of not guilty as to defendant Ward

on count I, as to defendant Hoffman on count III and as to defendant Furihata on count II. All said motions are denied with exception allowed."

On page 18 the evidence introduced in spport of the charge under count I is as follows:

"William M. Whitney, a witness produced on behalf of the Government, being duly sworn, testified as follows:

"Direct Examination

"I never saw Ward before his arrest. I made a search of rooms in the New Avon Hotel on August 17, 1922, and found liquor in a great many of the rooms. (The witness gave the number of the rooms.)

"It was admitted at this time that Prohibition Agents Lindville and Stetson would testify that liquor had been found in various rooms in the New Avon Hotel."

It is impossible to see how this court can determine from *this record* that the liquor involved in the possession count I is part of the liquor involved in the sale count II. The defendants were charged in count I with the possession of 27 bottles, each containing one-fifth gallon of a certain liquor known as whiskey; 13 pints of a certain liquor known as whiskey; 60 pints of a certain liquor known as distilled spirits; 17 quarts of a certain liquor known as beer, and four bottles each

containing one-fifth gallon of a certain liquor known as gin.

The fact that counsel for plaintiff-in-error Ward moved for a directed verdict of not guilty as to defendant Ward, alone, on count I only would indicate that the group of liquor selected by the Government did not involve the two bottles of liquor involved in the sale count II.

Counsel for plaintiff-in-error can get little comfort from the case cited by him of *Baldini v. United States*, 286 Fed. 133 (9 C. C. A.) at bottom of page 134, where this court said:

"We therefore think it clear that the record fails to show that the two alleged offenses related to the same transaction. It hardly needs to be said that no presumption to that effect can be indulged. See *Com. v. Lowery*, 159 Mass. 62, 34, N. E. 81, and cases there cited. Finding no error for which the judgment should be reversed, it is affirmed."

The court cannot go outside of the record before it, and is in the same position here as it was in the case just cited. Even if it were conceded that the same liquor was involved in counts I and II, there is no evidence in the record to show from which room, or from what source, the liquor came, and if this court followed the decision of the Cir-

cuit Court for the Sixth Circuit in the case of *Miller v. U. S.*, 300 Fed. 529. (7) p. 534, where, under the circumstances in that case it held possession to be a part of the sale, and that conviction under both counts to be a double prosecution. It could hold in this case that there is no inconsistency in the finding of the jury, and certainly not to the prejudice of Ward's rights. That case is one of many in which a salesman might be guilty of selling, and never have actual possession of the liquor.

Answer to Paragraph III.

Exception is taken to certain instructions and comments of the court. If the court made an error in referring to defendant Ward, the Government contends that it was harmless error. In the first place Ward was in the elevator while the conversation with regard to the sale of liquor was being carried on, and while the order was being given for the same, knew what it was about, went on up in the elevator with defendant Hoffman, came down and told the agents where to go, and took practically as much part in the transaction as defendant Hoffman, with the exception of the actual manual delivery of the liquor.

In addition to that portion of the instructions cited by counsel (Tr., pp. 30-31), the court said:

"You will simply conclude this case upon the evidence which is presented before you, and on the circumstances which have been detailed by the witnesses, and draw such inferences as are justified from all the facts and circumstances, together with the testimony which has been presented.

"Circumstantial evidence is just such testimony as the circumstances show of the facts to exist; it is legal and competent in criminal cases, but the circumstances must be consistent with each other; consistent with the guilt of the parties charged, and inconsistent with their innocense — inconsistent with every other reasonable hypothesis except that of guilt, and when it is of that character then it is sufficient to convict the parties. In this case you have the direct testimony, and you likewise have the circumstantial evidence, and you will take and weigh the both of them together."

From the foregoing it would appear that the rights of the defendant were carefully safeguarded by the court.

Answer to Paragraph IV.

The Government submits that sufficient evidence was introduced from which the jury could well conclude that defendant Ward did take part in the sale even though he did not deliver the liquor;

and that the instruction of the court complained of is correct and is sustained by the *Miller* case cited above.

It is submitted that the defendant Ward has had a fair trial and that the sentence of the lower court should be affirmed.

As to Plaintiff-in-Error Furihata

Contention is made by the plaintiff-in-error Furihata that there was insufficient evidence upon which to convict him of all three counts, namely, of possession, sale and maintaining a common nuisance, because he was not present on the occasions when agents made purchases on the premises, and had no knowledge of the activities of the defendant Hoffman, his employe, and did not consent to same.

The evidence of W. M. Whitney, and other agents (Tr., p. 18) shows that a large quantity of liquor, the amounts being set out in count I of the Information, was found in various rooms of the hotel. The record does not show that any of the liquor was found in the rooms occupied by guests in the hotel (except rooms 217 and 606, which liquor was excluded by the court in his instructions), and hence it must be inferred that these rooms were unoccu-

pied and consequently under the control of the owner.

The evidence of Gordon B. O'Hara (Tr., p. 15) shows that on his first visit Hoffman told him he could supply *any amount* of liquor he might want, which was not denied.

The evidence showed that this was a small hotel, and that the defendant Hoffman had been employed by Furihata for but a few days; and the jury by their verdict showed that they did not believe it was possible to have so much liquor concealed about a small hotel for sale in unlimited quantities to strangers without the knowledge and acquiescence of Furihata, the lessee, the employer and proprietor.

The facts are undisputed that the liquor was found there, and that the rooms were under lock and under the control of the owner. Furihata did not take the stand and account for the presence of the liquor in these unoccupied rooms * * * so that the only conclusion the jury could come to was that the liquor belonged to him, and was there for the purpose of sale.

While defendant Hoffman testified that the first sale he made was in his own room No. 606, and

from his own liquor, and while he claimed the liquor he obtained from room No. 402 was his own, he could not explain the presence of so much liquor in so many other rooms sufficiently well to satisfy the jury that he, alone, was interested in the great quantity of liquor found.

Had this case been one involving only the first sale to the agent of a drink, made by Hoffman in his own room, it is conceded that there might be merit in the contention of plaintiff-in-error Furihata; the court did exclude all evidence of liquor in room 606 and in room 217, and protected the rights of Furihatain in every way possible; but a landlord of a hotel cannot permit large quantities of intoxicating liquor to remain upon his premises, hire some one else to dispense it, and then shut his eyes like the proverbial ostrich and escape the penalties which the law exacts from him when discovered.

It has been repeatedly held that one or two sales of intoxicating liquor, when made under conditions which show that the premises were habitually used for the sale of liquor, are sufficient to sustain a conviction of maintaining a common nuisance, to which rule this case is no exception.

Young v. U. S., 272 Fed. 967 (9 C. C. A.);
Fassolla v. U. S., 285 Fed. 378 (9 C. C. A.);
Panzich v. U. S., 285 Fed. 871 (9 C. C. A.);
Traversi v. U. S., 288 Fed. 375 (9 C. C. A.);
Singer v. U. S., 288 Fed. 695 (3 C. C. A.);
Barker v. U. S., 289 Fed. 249 (4 C. C. A.);
Marshallo v. U. S., 298 Fed. 74 (2 C. C. A.).

The jury heard all of the evidence, saw the witnesses, received full and proper instructions from the court, and after a full consideration of the evidence, found defendant Furihata guilty on all counts as charged.

It is submitted that the defendant has had a full, fair and impartial trial, and that the judgment of the lower court should be affirmed.

Respectfully submitted,

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